

BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

IN THE MATTER OF
MILTON F. MOROZOWICH,

Appellant,

v.

DEPARTMENT OF SERVICES
FOR CHILDREN, YOUTH AND
THEIR FAMILIES,

Agency.

DOCKET NO. 98-12-135 /

DECISION ON MOTION
TO DISMISS

BEFORE Robert Burns, Vice-Chairperson, John F. Schmutz, Esquire, and John W. Pitts,
Members, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. §
5908(a).

APPEARANCES:

For the Department:

Joelle P. Hitch
Deputy Attorney General
Department of Justice
820 N. French Street
Wilmington, DE 19801

For the Appellant:

John F. Brady, Esquire
Brown, Shiels & Chasanov
401 Rehoboth Avenue
P. O. Drawer B
Rehoboth Beach, DE 19971

BACKGROUND

On September 15, 1997, Milton F. Morozowich submitted an application for the position of
Principal/Correctional School Administrator (Position K98-24) advertised with the Department of

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Services for Children, Youth and Their Families ("DSCYF"). On December 2, 1997, he was advised that the position had been filled. On December 5, 1997 he spoke with Katie Horvath of the State Personnel Office and was advised that DSCYF had informed State Personnel that following the screening of applications, those candidates determined "most suitable" were selected for interview. On December 11, 1997, Mr. Morozowich filed an appeal with the Merit Employee Relations Board ("MERB" or "Board") alleging violation of Merit Rules 13.0100 and 19.0100 in the filing of the position.

By motion dated April 15, 1998, DSCYF sought to have the Board dismiss the appeal because Mr. Morozowich was not entitled to pursue his appeal before MERB since his complaint alleged discrimination based on the actions of DSCYF, a state agency, and he was therefore required to follow the steps of the grievance process to have his grievance addressed and was not entitled to pursue a direct appeal to MERB.

Mr. Morozowich responded to the motion through legal counsel and asserted that his appeal was both timely and appropriately filed with the Board because of Ms. Horvath's responses that the State Personnel Office has delegated to the agency the discretion to reject applications filed for lack of attachments that were not listed on the announcement and that the agencies themselves establish objective evaluation criteria for the review of applications. DSCYF filed and served its written response on May 28, 1998 reiterating its position that Mr. Morozowich can not make a direct appeal to MERB because his grievance concerns alleged discrimination by DSCYF and that he has failed to allege that he has been the victim of discrimination because of an interpretation or application of the Merit Rules by the Director or any procedures or regulations established by the Director for the purpose of implementing the Merit Rules based on discrimination due to religious or political

opinions, affiliations, national origin, race or other non merit factors as required by Merit Rule 21.0112. The matter was presented to the Board by oral argument on November 12, 1998. This is the decision of the Board on the motion to dismiss the appeal.

DISCUSSION

A grievance or an appeal regarding discrimination in violation of Merit Rule 19.0100 is processed in accordance with either Chapter 20 or Chapter 21 of the Merit Rules. *See* Merit Rule No. 19.0300.

An applicant or an employee who has reason to believe that he/she has been discriminated against because of an interpretation or application of the Merit Rules by the Director or any procedures or regulation established by the Director for the purpose of implementing the Merit Rules may appeal directly to the Board. An employee who has reason to believe that he/she has been discriminated against by action within an agency should initiate a grievance in accordance with the grievance procedure. *See* Merit Rule No. 21.012. The term "Employee" is defined in Merit Rule Chapter 2, as: "[A]ny person legally holding a position in the classified service, excluding individuals or groups compensated on a fee basis."

Chapter 21 of the Merit Rules deals with appeals to MERB and provides for two (2) types of appeals: direct appeals and appeals from the grievance process. There are two (2) types of direct appeals: appeals from disciplinary actions (Merit Rule No. 21.0111) and appeals from discrimination (Merit Rule 21.0112). Other than appeals that are specifically provided for as direct appeals to the Board, all other appeals must come to the Board through the steps of the grievance process. *See* Merit Rule No. 21.0120.

In the present case, there is no issue as to the timeliness of the filing by Mr. Morozowich. The threshold issue is whether or not he is entitled to file a direct appeal with the Board or whether he is required to go through the steps of the grievance process to get to the Board. This issue requires the Board to apply Merit Rule No. 21.0112 to Mr. Morozowich's grievance and determine if he is an "employee" grieving an alleged discrimination within an agency or if he is an applicant or an employee grieving an interpretation or application of the Merit Rules by the Director or any procedures or regulations established by the Director for the purpose of implementing the Merit Rules. If the former, then he is required by the terms of Merit Rule No. 21.0112 to proceed through the steps of the grievance process and cannot file a direct appeal with the Board.

The Board concludes that in the current situation, although Mr. Morozowich was and is an employee of the DOC and technically a state employee as that term is defined in the Merit Rules, he is not an "employee" of the agency where the discrimination against him is alleged to have occurred. Therefore, the Board will not consider him as being precluded from bringing this direct appeal to the MERB on the claim of discrimination merely because of his employee status with a different agency.

Mr. Morozowich, through counsel, asserts that he has reason to believe that he has been discriminated against because of an interpretation or application of the Merit Rules by the Director or by the application of procedures or regulations established by the Director for the purpose of implementing the Merit Rules. He may or may not be able to ultimately establish such discrimination after hearing.

Any appeal such as this, pursuant to Merit Rule No. 21.0100, must be based on discrimination due to religious or political opinions or affiliations, national origin, race or other non-merit factors and may be filed directly with the Board. Mr. Morozowich's status as an employee of an agency

other than the agency he accuses of implementing such discrimination does not stand alone bar his direct appeal. Therefore, the appeal will not be dismissed and will be set for evidentiary hearing to afford Mr. Morozowich, in his capacity as an applicant for employment with DSCYF, the opportunity to present evidence that he was discriminated against in a manner prohibited by Merit Rule No. 21.0100.

ORDER

The Motion to dismiss the appeal of Mr. Morozowich in the above-captioned matter, having been considered by the Board, for the reasons set forth above, is hereby **DENIED**.

BY ORDER OF THE BOARD:

Susan L. Parker, Esquire, Chairperson¹

Robert Burns, Vice-Chairperson

Dallas Green, Member²

John F. Schmutz, Esquire, Member

John W. Pitts, Member

APPEAL RIGHTS

29 Del. C. § 5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof

¹Susan L. Parker, Esquire, voluntarily recused herself from this matter because of pending litigation wherein her law firm represents interest against the Delaware Department of Corrections.

²Dallas Green was unavoidably absent from the argument and deliberations concerning this matter.

of any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court are to be filed within thirty (30) days of the employee being notified of the final action of the Board.


29 Del. C. § 10142 provides:

(a) Any party against whom a case decision has been decided may appeal such decision to the Court.

(b) The appeal shall be filed within thirty (30) days of the day the notice of the decision was mailed.

(c) The appeal shall be on the record without a trial *de novo*. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.

(d) The Court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing Date: 2/3/99 

Distribution:

Original: File

Copies: Appellant's Representative

Agency's Representative

Merit Employee Relations Board

Susan L. Parker, Esquire, Chairperson

Robert Burns, Vice Chairperson

Dallas Green, Member

John F. Schmutz, Esquire, Member

John W. Pitts, Member